PERWIRA HABIB BANK MALAYSIA BHD.

v.

SEHATIAN DEVELOPMENT SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA M. YATIM J.
[CIVIL SUIT NO. C23-2066-86]
17 AUGUST 1993

PRACTICE AND PROCEDURE: Summary judgment - Loan - Guarantee - Receipt of Letters of Demand in issue - AR Cards not returned to sender - Whether there was proper demand made to guarantors - Variation of terms of agreement - Whether plaintiff entitled to do so - Purported revocation of guarantee - Whether in fact a revocation or a release.

The plaintiff entered final judgment against the third and fourth defendants who had acted as guarantors in a bridging loan facility granted to the first defendant. The third and fourth defendants appealed to the High Court against the decision of the SAR, raising 3 issues before the learned Judge.

Firstly they stated that the demand letters had, according to the plaintiff, been sent by AR registered post. But the plaintiff had not received the AR card. There was no requirement in the guarantee that letters of demand be sent by AR registered post. The question that arose was whether there had been a proper letter of demand from the plaintiff to the defendants in view of the case of *Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors.* [1989] 1 MLJ 47.

Secondly, they contended that following the terms in the letter of offer, a drawdown was only to be made after the execution of all security documents and the presentation of the charge for registration. This condition was a condition precedent. However, the drawdown was in fact made before the finalisation of the security documents. The plaintiff had no right to waive or vary the condition precedent.

Thirdly, it was contended that the defendants had revoked the guarantee in 2 letters dated 12 September and 3 October 1984. They were thus discharged from their obligations as guarantors.

Held:

[1] Clause 11 of the letter of guarantee allows notices of demand to be despatched by registered post. Thus the plaintiff was entitled to despatch the letters of demand by registered post to the defendants' address. The plaintiff has exhibited a certificate of posting which shows that the AR registered letters were despatched on 14 May 1986 and the list contains the names of the third and fourth defendants and their respective addresses. In view of the above and the definition in s. 3 of the Post Office Act 1947 which defines "delivery", the Court finds that the said AR registered letters sent to the third and fourth defendants at their respective addresses were deemed to be delivered to them and accordingly deemed to have been received by them.

[2] Clause 5 of the letter of guarantee entitles the plaintiff to vary the terms of the agreement as contained in the letter of offer with regard to the drawdown. The clause in fact shows an explicit agreement by the defendants to any variation by the plaintiff without any need for reference to them (the defendants).

[3] The purported letter of revocation from the third and fourth defendants were not in fact from them (the guarantors) but from the first defendant, the company which was the borrower. The letters were merely copied to the guarantors. The letters also did not ask that the guarantee be revoked but that plaintiff consider "releasing" the guarantors, the third and fourth defendants. The letters thus are not notices of revocation, nor notices of discontinuance. The third and fourth defendants remain as guarantors. Even assuming there had been a discontinuance effected by the third and fourth defendants, clause 2 of the agreement continues to make the guarantors liable for the debts of the borrower in spite of any discontinuance.

[Appeal dismissed with costs].

Cases referred to:

Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors. [1989] 1 MLJ 47 ***(dist)***

R v. The Westminster Unions Assessment Committee [1917] 1 KB 832 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 83
Post Office Act 1947, s. 3

For the plaintiff - M/s. Suhaimi Khor, Zulkifli & Chang
For the defendants - M/s. Arifin & Partners

JUDGMENT

Dr. Zakaria M. Yatim J:

This is an appeal by the third and fourth defendants against the decision of the Senior Assistant Registrar allowing the plaintiff to sign final judgment against them in the sum of RM823,591.04 together with interest at the rate of 13.5% per annum from 1 May 1986 to the date of full realisation.

The plaintiff granted the first defendant a bridging loan in the sum of RM750,000 on 21 July 1984 at the first defendant's request. The third and fourth defendants together with the second defendant guaranteed the payments of the said loan and all other monies payable by the first defendant. The plaintiff claimed that a sum of RM823,591,04 was due and owing from the defendants but the defendants had failed to pay the said sum.

At the hearing of the appeal, Counsel for the defendants raised only three issues.

One of the issues raised was that there was no proper letter of demand from the plaintiff. Counsel submitted that the plaintiff had not sent proper letters of demand to the third and fourth defendants as the AR cards were not returned to the plaintiff. She said that there was no requirement in the guarantee to send the letters of demand by AR registered post. She then cited *Public Bank Bhd. v. Rasatulin Holdings Sdn. Bhd. & Ors.* [1989] 1 MLJ 47.

I note that in this case the defendants were only questioning the service of the letter of demand but did not question the content of the letter of demand itself.

Counsel for the plaintiff submitted that the letters of demand were properly served on each of the defendants by AR registered post. In support of her submission, she referred to s. 3 of the Post Office Act 1947 and the Post Office Rules 1947. She also referred to a "certificate" of posting issued by the Postal Department where the AR registered letters containing the letters of demand addressed to the third and fourth defendants were included.

In considering this issue it is necessary to examine the terms in the letter of guarantee. Clause 11 of the letter of guarantee states as follows:

> (11)Any notice, by way of demand, request or otherwise hereunder may be given to me/us or any of us personally **or may be despatched by registered post addressed to me**/us at the address herein and if sent by post, it shall be deemed to have been duly given when it would reach me/us in due course of post.
> [Emphasis added]

It is clear from the above clause, the plaintiff was entitled to despatch the letter of demand by registered post to the defendant's addresses.

In his affidavit affirmed on 8 January 1987 on behalf of the plaintiff, Mr. Hanipah bin Yop averred that the letters of demand to the third and fourth defendants were sent by AR registered post to each of them. He said that the AR registered cards were not returned,

> but I am shown copies of the certificate of posting of the said letters of demand to the third and fourth defendants ...

From his affidavit I gather that neither the AR registered letters nor the AR cards were returned to the plaintiff.

Mr. Hanipah referred to the certificate of posting exhibited to his affidavit as HY4. This certificate contains a list of registered letters with the names of the addressees and their addresses delivered by the Postal Department, Kuala Lumpur to various parts in the country. According to the stamping mark at the bottom of the exhibit the AR registered letters were despatched on 14 May 1986. Page 2 of the list, contains the names of the third and fourth defendants and their respective addresses. It is not in dispute that the names and addresses of the third and fourth defendants were correctly written in the certificate of posting.

The question here is whether the Court can consider that the said AR registered letters despatched to the third and fourth defendants at their respective addresses by the Postal Department in Kuala Lumpur were received by them. Counsel of the plaintiff referred to the definition of "delivery" in s. 3 of the Post Office Act 1947. Section 3 defines "delivery" as follows:

> the delivery of a postal article at the house or office of the addressee, or to the addressee or to his servant or agent or other person considered to be authorised to receive the article according to the usual manner of delivering postal articles to the addressee or to a box provided, pursuant to the rules made under s. 24, on or contiguous to any premises or the compound thereof for the receipt of

> postal articles bearing the address of those premises, ... shall be **deemed to be delivery** to the addressee.

In view of the above definition, I am of the view that the AR registered letters sent to the third and fourth defendants at their respective addresses were deemed to be delivered to them.

Accordingly, the third and fourth defendants were deemed to have received the letters of demand sent by AR Registered post. In *R v. The Westminster Unions Assessment Committee* [1917] 1 KB 832 the Court held:

> that delivery to the post office of a letter containing a notice properly addressed and prepaid as directed by s. 65 raises a presumption that the notice has been received by the addressee; that this is not merely a presumption of fact until the contrary is shown, but is a presumption of law which cannot be rebutted by showing that in fact the notice had not been received.
>
> That s. 65 provides a statutory method of giving notice, and that when a notice has been sent as directed it is not necessary to show that the addressee has received it.

The next issue raised by the defendants was that the plaintiff had made material and substantial variation in the terms of the contract between the plaintiff and the borrower without giving notice or obtaining the consent of the third and fourth defendants.

Counsel for the defendants submitted that the letter of offer provided that the drawdown was to be made only after the execution of all security documents and the presentation of the charge for registration. She said that the said condition was a condition precedent which should have been strictly followed by the plaintiff and since the drawdown was made before the finalisation of the security documents, the plaintiff had broken one of the fundamental principles in law. Counsel added that the letter of offer did not give the plaintiff the right to waive or vary the condition precedent.

Counsel for the plaintiff replied that the plaintiff could vary the terms of the drawdown. The third and fourth defendants were directors of the first defendant and they should be aware of the request for early drawdown. She referred to Clause 5 of the letter of guarantee, which states as follows:

> You may, as you think fit and without reference to me/us grant the Principal time or other indulgence or make or accept any arrangement or composition with him in respect of any indebtedness hereby guarantee and also **vary**, renew, release, or in any way deal with any securities or rights now or hereafter held by you in respect of the indebtedness.

From the above clause, the plaintiff was entitled to vary the terms of the agreement as contained in the letter of offer with regard to that drawdown. In clause 5 above the third and fourth defendants had explicitly agreed to any variation by the plaintiff with regard to the bridging loan facility without any reference to them.

The third issue raised by the third and fourth defendants was that they had revoked the guarantee by notice given on 12 September 1984 and accordingly they were discharged from their obligations as guarantors.

Counsel for the defendants referred to s. 83 of the Contracts Act 1950, which states as follows:

> A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the Creditor.

There were two purported letters of revocation dated 12 September 1984 and 3 October 1984. The contents of both letters are the same. I reproduce below the letter dated 3 October 1984:

> Perwira Habib Bank Bhd.,
> Credit Department,
> Seri Petaling Branch,
> No. 11 & 12, Jalan Radin Tengah,
> Bandar Baru,
> Seri Petaling,
> Kuala Lumpur.
>
> Dear Sir,
>
> Re: Sehatian Development Sdn.,
> Guarantorship A/C No. 699
>
> I am directed and pleased to inform that the directors, Mr. Lee Moon Kum and Mr. Tan Kim Hon have resigned and disposed all their shares on 1 August 1984 and furthermore, Madam Au Kui Fah, Miss Sze Tho Mun Kei be appointed as directors of the Company. For your information enclosed herewith a photostat copy of Form 49 for your perusal.
>
> Since the two directors, Mr. Lee Moon Kum and Mr. Tan Kim Hon have no interest in the Company, as such, I was pleased if your bank would kindly consider to release the two guarantorship and Mdm. Au Kui Fah and Miss Sze Tho Mun Kei would be the new

guarantor in placed of the two directors, Mr. Tee Kim Hon and Mr. Lee Moon Kum.

Your attention and necessary procedure of the charge would be much appreciated.

Thank you.

Yours faithfully,
Sgd.

c.c. Mr. Tan Kim Hon
Mr. Lee Moon Kum
Perwira Habib Bank Bhd., Head Office.

Counsel for the plaintiff rightly pointed out that in the above letter, the notice was given by the company and not by the guarantors themselves. It will be noted that the above letter was only copied to the guarantors. Counsel also said that the letter did not ask for the guarantee to be revoked but merely asked that the guarantors be released. Counsel further said that the plaintiff did not agree to such release. In any event, she said, clause 2 of the guarantee provided that notwithstanding any discontinuance, the guarantors were still liable for the debts incurred by the borrower.

I respectfully agree with the submission of Counsel for the plaintiff. The above letter was not from the guarantors but it was from the company. The guarantors were only given copies of the letter. As Counsel for the plaintiff had said, the letter did not ask that the guarantee be revoked. The letter merely asked the plaintiff if the plaintiff "would kindly consider to release the ... guarantorship ..." I find that the letter is not a notice of revocation. It is also not a notice of discontinuance. In my opinion the second, third and fourth defendants remained as guarantors under the terms of the guarantee. Even if they had discontinued as guarantors, under clause 2 of the guarantee they are still liable for the debts of the borrower. Clause 2 *inter alia* states:

> In case of discontinuace by notice, this guarantee shall, nevertheless as to the parties giving notice continue to be binding on them and their personal representatives in respect of all liabilities of the Principal up to the limit abovementioned at the date of receipt of such notice, whether certain or contingent, and also for any credits established for the Principal and for all instruments drawn before the date of receipt of the notice, though actually paid or honoured after that date.

Having considered all the issues raised by the defendants, I am of the view that the Senior Assistant Registrar was right in entering final judgment against them.

In the circumstances, I dismiss the appeal with costs.